

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1286

To Be Argued by:
GERALD M. TRAFALSKI

Approximate Time:
20 minutes

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff

vs.

C/A Ref. No.
T-6166

ALFRED DANIEL MILLER

Defendant

Brief for Defendant--Appellant

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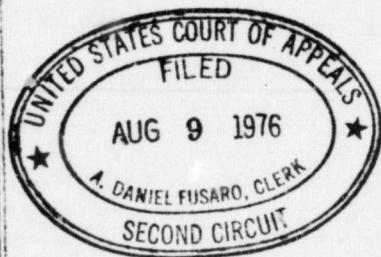


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ISSUE

Was the defendant-appellant denied due process of law when the trial court allowed the jury to consider irrelevant and prejudicial testimony?

STATEMENT

This is an appeal by the defendant-appellant, Alfred Daniel Miller, from a judgment of conviction rendered on June 7, 1976 in the United States District Court for the Western District of New York (Honorable John T. Elfvin). The judgment was entered upon a jury verdict returned on May 26, 1976, which found Mr. Miller guilty of:- (1) Bank Robbery in violation of Title 18, United States Code, Section 2113(a), that is, that Mr. Miller willfully, unlawfully and with felonious intent, did by force, violence and intimidation take from the presence of Karen Rice approximately \$1,943.00 in money belonging to and in the care, custody and control, management and possession of the Marine Midland Bank-Western, Main and Seneca Streets, Buffalo, New York, the deposits of which were then insured by the Federal Deposit Insurance Corporation; (2) Larceny in violation of Title 18, United States Code, Section 2113(b), that is, that Mr. Miller willfully and

unlawfully did take and carry away, with intent to steal and purloin, from the Marine Midland Bank-Western, Main and Seneca Streets, Buffalo, New York, and deposits of which were then insured by the Federal Deposit Insurance Corporation, certain money aggregating approximately \$1,943.00 belonging to said bank and in its care, custody, control, management and possession; and (3) Assault in violation of Title 18, United States Code, Section 2113(d), that is, that Mr. Miller willfully, unlawfully and with felonious intent, did by force, violence and intimidation take from the presence of Karen Rice approximately \$1,943.00 in money belonging to and in the care, control, custody, management and possession of the Marine Midland Bank-Western, Main and Seneca Streets, Buffalo, New York, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Mr. Miller, in committing the aforesaid offense, did assault said Karen Rice. Mr. Miller was sentenced to the custody of the Attorney General of the United States for a period of fifteen (15) years on the bank robbery conviction, for a period, to run concurrently with the first sentence, of eight (8) years on the larceny conviction, and for a period, to run concurrently with the first sentence, of fifteen (15) years on the assault conviction.

FACTS

On August 14, 1975, the defendant-appellant, Alfred Daniel Miller, was indicted by a Federal Grand Jury and charged with violation of Title 18, United States Code, Sections 2113(a), (b) and (d). The indictment stemmed from a robbery of the Marine Midland Bank-Western, Main and Seneca Streets, Buffalo, New York, on July 31, 1975, at which time approximately \$1,943.00 was taken from Karen Rice, a teller at said bank. Count One charged Mr. Miller with bank robbery; Count Two charged Mr. Miller with larceny; and Count three charged Mr. Miller with assault of Karen Rice while he was in the commission of the aforementioned offenses. The third count "was based on the fact that the defendant displayed to the victim teller a realistic replica of a .38 caliber pistol, which at the time she felt to be a real gun, and which resulted in her assault." (Appendix, p. A-3)

Thereafter, on August 15, 1975, Mr. Miller entered a guilty plea to the first count of the indictment. However, when Mr. Miller was to be sentenced, September 26, 1975, he claimed that he was mentally disturbed at the time of the bank robbery and related offenses. Accordingly, Mr. Miller's plea was vacated and the matter was set down for trial.

The case came on for trial on May 25, 1976. During the direct examination of FBI agent, Thomas D. Langer, by the prosecution, Mr. Langer was questioned about a "green and bluish bag" in the possession of Mr. Miller when he was apprehended by the FBI. (Appendix, pp. A-4 - A-9) While enumerating the items in this bag, Mr. Langer testified that he found a "five and a half inch blade knife." (Appendix, p. A-6) Mr. Langer proceeded to describe the knife in detail. (Appendix, pp. A-6 - A-7)

At the close of the direct examination of Mr. Langer, the defense counsel moved for a mistrial on the ground that the introduction of the knife into evidence was highly prejudicial. More particularly, the defense counsel noted that the jury could be "of the opinion that perhaps Mr. Miller would have used a knife, et cetera, or that he had an actual knife in his possession where there is no allegation of that in any stage of this proceeding. . ." (Appendix, p. A-10) The Court agreed that "there is no evidence that it [the knife] had anything to do with the robbery." (Appendix, p. A-11) The prosecution responded that the knife was relevant because

"if an insanity defense is later raised, which I [Edward J. Wagner, Assistant United States Attorney] expect it may be, it [the knife] proves that - - and part of the insanity defense is going to be that the man did not appreciate the wrongfulness of his acts, that is the law, we are going to argue that a man who did not appreciate the wrongfulness of the act, and therefore thought it was not wrong to rob

banks, would not take steps to harm [arm] himself, would not take steps to flee, would not take steps to conceal his identity, change his clothes after the robbery, would not take steps to write out a demand, if he thought it was not wrong, he would not do those things." (Appendix, pp. A-11 - A-12)

Although the Court believed that the knife should have been introduced after the defense counsel had raised the insanity defense, it agreed that the knife "may have some bearing upon the overall sanity and finding of objectivity" of Mr. Miller. (Appendix, p. A-13) Accordingly, the Court denied, without prejudice, the motion for a mistrial. (Appendix, p. A-14)

At the close of the case, the defense counsel renewed his motion for a mistrial. (Appendix, p. A-15) While the prosecution argued that the knife was admitted to show "knowledge, intent, scheme, design, consciousness . . .," the Court noted that the prosecution had neither mentioned the knife in its cross-examination of Dr. Bruno G. Schutkeker, the psychiatrist called by the defense counsel, nor in its rebuttal examination of Dr. Richard E. Miller. (Appendix, p. A-20) The Court believed that the knife "ought to have been dealt with by the psychiatrist." (Appendix, p. A-22) Consequently, the Court had to decide "the raw problem of whether or not there was any substantial prejudice to the defendant from having that [the knife] mentioned." (Appendix, p. A-23) Although the Court stated that "there should have been no mention of the knife," it denied the motion for

a mistrial on the ground that there had been no material or substantial prejudice to Mr. Miller when the knife was introduced into evidence. (Appendix, pp. A-24 - A-25)

THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT ALLOWED THE JURY TO CONSIDER IRRELEVANT AND PREJUDICIAL TESTIMONY.

The admissibility of evidence in the trial of criminal cases is governed by Rule 402 of the Federal Rules of Evidence. According to Rule 402:-

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Fed. Rules Evid. Rule 402, 28 U.S.C.A.

Thus, relevancy is the principal test of admissibility in criminal prosecutions. O'Brien v. United States, 411 F.3d 522 (5th Cir. 1969).

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as:-

". . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rules Evid. Rule 401, 28 U.S.C.A.

Thus, evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from that evidence. United States v. Allison, 474 F.2d 286 (5th Cir. 1973), cert.

denied 95 S. Ct. 91.

Although "relevant evidence" is precisely defined, the determination of relevancy is not automatic or mechanical. United States vs. Allison, supra. Courts cannot employ a precise, technical, legalistic test for relevancy; rather, courts have to determine whether evidence is relevant in light of the particular facts of the individual case. United States vs. Allison, supra. Yet, evidence which has no probative value with respect to any issue is not admissible, and the trial court has the duty to exclude such evidence from consideration of the jury. United States vs. Higgins, 362, F.2d 462 (7th Cir. 1966), cert. denied 87 S.Ct. 316, 385 U.S. 945, 17 L.Ed.2d 224. Likewise, evidence of collateral facts, not directly connected with the subject matter under consideration, is inadmissible. Meade vs. Cox, 310 F.Supp. 233 (W.D.Va. 1970), aff'd. 438 F.2d 323, cert. denied 92 S.Ct. 234, 404 U.S. 910, 30 L.Ed.2d 182.

Applying Rules 402 and 401 of the Federal Rules of Evidence and case law interpretations of relevancy to the present case, it is contended that Mr. Langer's testimony that Mr. Miller possessed a knife when he was apprehended by the FBI was irrelevant evidence. Thus, the trial court should have excluded this testimony from consideration by the jury; moreover, the trial court should have granted the defense counsel's motion for a mistrial.

When the defence counsel questioned the relevancy of the knife, the prosecution responded that the knife was "directly relevant" for two reasons: (1) the knife was proof that Mr. Miller appreciated the wrongfulness of his acts because it showed an attempt to arm himself; and (2) the knife showed Mr. Miller's guilty state of mind. (Appendix, pp. A-11 - A-13) The trial court explicitly rejected the latter contention. (Appendix, p. A-13) However, the trial court agreed with the prosecution that the knife could have some bearing upon the issue of Mr. Miller's sanity when he committed the crimes. (Appendix, p. A-13) The court stated:

"If it is in for that purpose [proof of Mr. Miller's sanity], fine. Otherwise, we have a prejudice of the knife being brought into view of the jury and talked about as being on the defendant's person when, in fact, it had no involvement with the bank." (Appendix, A-13)

In addition, the court advised the prosecution:

"There is going to be the insanity defense evidence put in, and I don't know what the substance of it will be, how much there will be to it, but I can agree if it is in, it has come probity, but it seemingly better to wait bringing in items to rebut that until you get to a rebuttal situation." (Appendix, pp. A-13 - A-14)

Although the prosecution claimed the knife was relevant to show that Mr. Miller appreciated the wrongfulness of his acts, the prosecution neither questioned Dr. Bruno G. Schutkeker, a psychiatrist called by the defense counsel, nor Dr. Richard

F. Miller, a psychiatrist called by the prosecution to rebut Dr. Schutkeker's testimony, about whether the knife showed that Mr. Miller appreciated the illegality of his acts. The failure by the prosecution to relate the possession of the knife to Mr. Miller's sanity perturbed the trial court.

THE COURT: In the presence of your having asked the psychiatrist anything about it - - -

MR. WAGNER: About the knife?

THE COURT: - - How would this interrelate with any competency or knowledge or intent?

MR. WAGNER: I did not ask the psychiatrist about the knife because Mr. Trafalski objected to it being used, and your Honor prevented it from being admitted.

THE COURT: That is right. At that time you were indicating that this had a bearing upon the man's mental competency and intentions at that time because here he was carrying this weapon, although he had the toy gun or replica of a gun.

MR. WAGNER: I did not ask the doctor about the knife. I did not want to raise an issue that Mr. Trafalski had objected to.

THE COURT: You mean that you did not understand me when I indicated that my ruling [denial of defense counsel's motion for a mistrial] was without prejudice to the renewal of that motion, and that you were going to somehow interrelate this into the competency problem?

(Appendix, pp. A-16 - A-17)

Thereafter, the prosecution replied that it had not investigated the relationship of the knife and Mr. Miller's competency because other items of evidence existed to prove Mr. Miller's sanity.

(Appendix, pp. A-17 - A-18)

The trial court was not satisfied with this response by the prosecution. It continued to question the prosecution about the relevance of the knife.

THE COURT: That [the knife] has a bearing on the assault aspect of the Subsection (d) [Title 18, United States Code, Section 2113(d)], does it not?

MR. WAGNER: I don't believe the knife has any relevancy if she [Karen Rice] didn't see --

THE COURT: That is right, that is what Mr. Trafalski is saying. So therefore he is saying that Mr. Miller is then prejudiced by having a knife brought into the evidenciary picture.

MR. WAGNER: I disagree, I think that value of the knife, if it were admitted and argued, is that it shows knowledge, intent, scheme, design, consciousness of --

THE COURT: That is why I particularly note the absence of any follow-up in that regard with the psychiatrist.

(Appendix, pp. A-19 - A-20)

In addition:

THE COURT: You have to have something that has relevance.

MR. WAGNER: Well --

THE COURT: The knife and the bag, with no knife being shown in the bank or otherwise used, has no relevance.

MR. WAGNER: It doesn't have --

THE COURT: I thought you were going to show relevance?

MR. WAGNER: I think it has relevance if it were admitted, but I think it can argue strenuously that it is not prejudicial either. Like the A.M.&A's bag has no relevance

no probative value, other than it was on him, anymore than a handkerchief in his pocket, but it is not prejudicial. As a matter of fact, I think the knife, if it were admitted, would be admitted very wisely on the argument that it does show plan, it shows consciousness that the act was wrong.

THE COURT:

Well, I agree. In a situation where there was not psychiatric testimony based upon psychiatric examination, I could see that you would leave this to lay argument and lay evaluation, but where you have psychiatric testimony and an issue of insanity in the case, it seems to be that ought to have been dealt with by the psychiatrist --

MR. WAGNER: Your Honor --

THE COURT:

-- particularly in view of what I understood you to say at the time I denied the motion for a mistrial without prejudice.

(Appendix, pp. A-21 - A-22)

Apparently dissatisfied with the prosecution's explanation of the relevancy of the knife, the trial court realized it had the "raw problem of whether or not there was any substantial prejudice to the defendant from having that [the knife] mentioned." (Appendix, p. A-23) Although the trial court believed the knife should never have been mentioned, it denied the defense counsel's renewed motion for a mistrial because there was no material or substantial prejudice to Mr. Miller. (Appendix, pp. A-24 - A-25)

The aforementioned dialogues between the trial court and the prosecutor reveal that any testimony concerning the knife was irrelevant. Since the principal fact in issue was Mr. Miller's

sanity or insanity when he committed the offenses, only evidence designed to reveal his mental processes was germane, United States v. Green, 373 F. Supp. 149 (E.D.Pa. 1974). Although the prosecution had several opportunities to explain the relevance of the knife, it could never satisfactorily show the probative relationship between the knife and Mr. Miller's ability to comprehend the wrongfulness of his acts. Thus, the knife could not assist the jury in its determination of whether Mr. Miller was sane when he robbed the bank and committed the other crimes. According to Rule 402 of the Federal Rules of Evidence, the jury should not have been allowed to consider this testimony. Moreover, the trial court should have granted the defense counsel's motion for a mistrial.

The testimony concerning the knife only served to prejudice the jury against Mr. Miller. The importance of this prejudice is reflected by the fact that the psychiatric testimony about Mr. Miller's sanity or insanity was inconclusive. Both the defense counsel and the prosecution knew that Dr. Schukeker found that Mr. Miller was insane and that Dr. Miller believed that Mr. Miller was sane. Consequently, when the jury decided the issue of mental competency, it is extremely possible that the jury discounted these diametrically opposed opinions and decided that issue of insanity on the testimony of the other witnesses.

Since there was testimony concerning a knife, it is extremely possible that the jury used this testimony in their deliberations. Any use of this irrelevant testimony resulted in undue prejudice toward Mr. Miller. This undue prejudice far outweighed the probative value of this testimony. Accordingly, Mr. Miller was denied due process of law.

CONCLUSION

The defendant-appellant, Alfred Daniel Miller, was denied due process of law when the trial court allowed the jury to consider irrelevant and prejudicial testimony.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff

vs.

C/A Ref. No.
T-6166

ALFRED DANIEL MILLER

Defendant

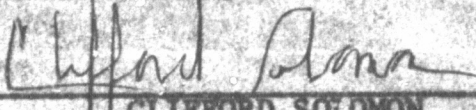
STATE OF NEW YORK }
COUNTY OF ERIE } SS:
CITY OF BUFFALO }

CLIFFORD SOLOMON, being duly sworn, deposes and says:

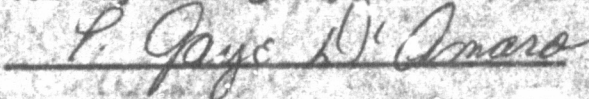
That I am employed by the law firm of CARLISI, CARLISI
AND TRAFALSKI.

That on or about the 4th day of August, 1976, I personally delivered two copies of the Briefs and Appendices in the above entitled action to the office of the United States Attorney in Buffalo, New York.

That GERALD M. TRAFALSKI has been assigned to represent the defendant-appellant, ALFRED DANIEL MILLER.


CLIFFORD SOLOMON

Sworn to before me this
4th day of August, 1976.



NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
My Commission Expires March 30, 1977